Filed 2/23/05 P. v. Manning CA3

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE, Plaintiff and Appellant, v. SHERMAN MANNING, Defendant and Respondent.	C045940 (Super. Ct. No. 98F11110)

In this appeal, the People challenge what they contend was an "unauthorized judicial plea bargain" in which the trial court sentenced defendant Sherman Manning to six years in prison after striking one of his two prior serious felony convictions. In the alternative, the People argue that even if the plea agreement was authorized, the trial court abused its discretion under Penal Code section 1385, subdivision (a), when it struck the prior conviction for purposes of sentencing. (Further section references are to the Penal Code.) We shall affirm the judgment.

FACTS AND PROCEDURAL BACKGROUND

On April 1, 1998, while incarcerated at the California State Prison, Sacramento, defendant mailed a letter to Los Angeles County Superior Court Judge Richard Neidorf. The letter contained a threat to Mary Hanlon Stone, a Los Angeles County Deputy District Attorney who prosecuted defendant for the crimes for which he was committed to state prison. The letter stated in pertinent part: "Prosecutor Mary Hanlon will lose her life in twelve days; I have ordered her murdered. She deserves to die. . . . Hanlon is a . . . win at all costs cancer which must be excised from the body of humanity."

Defendant was charged in Sacramento County with threatening Mary Hanlon Stone, a staff member of a public official, with death or great bodily injury (§ 76; count one) and making a criminal threat to her (§ 422; count two). He also was charged with threatening Sheriff Stanley Tuggle, an elected public official, with death or great bodily injury (§ 76; count three). It was further alleged defendant had two prior serious felony convictions in California for purposes of the "three strikes law" (§§ 667, subd. (b)-(i) & 1170.12), as well as a prior conviction in Georgia for threatening a judge (§ 76, subd. (a)(2)).

After the People moved to dismiss count three because of "insufficient evidence," defendant pled "to the sheet," i.e., pled guilty to counts one and two, and admitted he had two prior serious felony convictions for forcible sodomy and forcible oral copulation in California and a prior felony conviction in Georgia. Defendant entered his pleas and admissions with the understanding that, over

the People's objection, defendant would be sentenced to a term of six years in state prison.

Despite the People's argument that defendant "falls well within the zone of the three strikes law," the trial court struck one of defendant's prior serious felony convictions and sentenced him to six years in state prison (double the upper term of three years) on count one, to run consecutively to the term of 16 years that he already was serving in prison for forcible sodomy and oral copulation. The court explained that it struck one prior serious felony conviction "in the interest of justice" because although the court was "sympathetic to the victim receiving a letter and being in fear," the threat was "extremely unsophisticated" in that defendant signed his name on the letter and "the People have been able to come up with no means by which the defendant was going to carry this out," since he was serving a 16-year term.

The trial court later voided the pleas and sentencing because no action had been taken on defendant's plea of not guilty by reason of insanity (NGI). Thereafter, defendant withdrew his NGI plea and asked the court for the sentence previously imposed. The matter was continued for a new plea and sentencing hearing.

The victim spoke at the new plea and sentencing hearing, expressing her shock and fear after reading the death threat from defendant, whom she described as a "cunning, cruel, violent" "sexual predator" with a "long list of offenses." Once again, the prosecutor objected to the court permitting defendant to plead to the charges in exchange for receiving a six-year term,

an arrangement the People characterized as "illegal plea bargaining."

The trial court then engaged in the following colloquy with the prosecutor regarding defendant's prior record and his conduct while incarcerated in state prison.

"THE COURT: In 1990 in [Georgia], . . . the defendant threatened . . . a judge, but he received a two-year sentence. [¶] Correct?

"[THE PROSECUTOR]: I believe that's correct, Your Honor.

"THE COURT: There was no subsequent follow-up to threaten that person, stalk that person. And, in fact, the victim did not prevent the defendant's paroling at apparently the earliest possible time of two years. [¶] Is that correct?

"[THE PROSECUTOR]: As far as I know, Your Honor, that is correct.

"THE COURT: In this Complaint, you had another victim, a Sheriff Stanley Tuggle, and you dismissed that charge.

"[THE PROSECUTOR]: For insufficient evidence.

"THE COURT: He received a threatening letter?

"[THE PROSECUTOR]: Yes, Your Honor. [¶] . . . [¶]

"THE COURT: Did he indicate to you he didn't feel threatened?

"[THE PROSECUTOR]: Yes. [¶] . . . [¶]

"THE COURT: All right. The defendant has a history in prison of getting 115's for threatening. [¶] In 1996 . . . he threatened to kill a cellmate because the cellmate told him he was a homosexual.

"[THE PROSECUTOR]: Yes, Your Honor.

"THE COURT: What was the result of that threat in 1996 to the cellmate?

"[THE PROSECUTOR]: Well, the result was discipline to [defendant]. But the cellmate was not injured and fortunately not killed.

"THE COURT: Defendant was not prosecuted?

"[THE PROSECUTOR]: No, he was not.

"THE COURT: He lost some good-time work-time [credits]?

"[THE PROSECUTOR]: Yes.

"THE COURT: All right. In 1998 you indicated he threatened some staff, threatened to spit on a correctional officer.

"[THE PROSECUTOR]: Yes, Your Honor. May of '98. And in April of '98 he threatened to commit what's called aggravated battery by gassing, in other words a threat to spit in two different officers' faces.

"THE COURT: Was he prosecuted for either of those?

"[THE PROSECUTOR]: No, Your Honor.

"THE COURT: He lost some good-time work-time [credits]?

"[THE PROSECUTOR]: Yes, Your Honor.

"THE COURT: In March of 2000, he threatened another officer? I have March 15th of 2000 threatening to throw boiling water on a correctional officer.

"[THE PROSECUTOR]: Yes, Your Honor. That's correct.

"THE COURT: Was he prosecuted for that?

"[THE PROSECUTOR]: No, Your Honor.

"THE COURT: He lost good-time work-time [credits]?

"[THE PROSECUTOR]: Yes, Your Honor.

"THE COURT: [His current] case has taken approximately five years to get through our system, and [defense counsel] is his fourth attorney. And it's my recollection that [defendant] threatened each and every one of his prior attorneys and that's why they were allowed to withdraw. [¶] Is that your recollection, also? [¶] . . . [¶]

"[THE PROSECUTOR]: I'm not aware of any threats --

"THE COURT: This may be incorrect, but it's my understanding [that different attorneys have been assigned to defendant] four times because [he] is threatening his attorneys. He's never been prosecuted for that, however. That's just my recollection.

"[THE PROSECUTOR]: Yes. That's correct."

At this point, the trial court explained why it would strike one of defendant's prior serious felony convictions and sentence him to six years in prison (double the middle term) if defendant admitted all of the charges against him.

"THE COURT: . . . In this matter, I understand very well . . . from personal experience that a threatening letter is highly upsetting. It unsettles you for . . . days, weeks, months, obviously years. [¶] The victim has been quoted in the paper today of saying that she feels if the defendant gets six years at eighty percent, he is, quote, getting away with it. [¶] And at that point I have to disagree with her assessment. [¶] Nobody said it wasn't criminal what he did. Nobody said it was misdemeanor conduct. Nobody said it wasn't worth a subsequent prior prison term at eighty percent. [¶] What I'm trying to do is fashion a sentence that I feel takes into consideration the totality of [defendant's] mental illness and his

proclivity to lash out verbally and in writing. But, clearly, for the last thirteen years he lashes out with no follow-up, and that is what I'm trying to figure out, a just disposition for his conduct. [¶] I don't think there's any question he suffers from a bipolar disorder and he was reportedly off his medication when this happened. [¶] As we all know, every time we see [defendant] we wonder who's going to show up, the gentleman who stands there quietly and says yes, sir, or the one who lashes out at everybody and everything, accuses us all of injustice, racism, et cetera. This man clearly has multiple personalities, and he definitely needs to remain medicated. [¶] He asked a guard to help him mail this letter, so I do stick with the fact I find this lacks sophistication. [¶] I understand that he referred to another defendant. I understand that had an unsettling effect, also. But I still find that having a guard mail your threatening letter is not a sophisticated way to carry out this crime. [¶] The letter was mailed in 1998. He was not going to get out for, I don't know how many years, over ten years after that, and there has been no indication since 1998 of any continuing animosity towards this victim. [¶] The Court is cognizant of the fact the defendant does not appear to be a member of any violent prison gang. He doesn't have a network of associates that might be called upon to carry out such an order. Sadly, it appears that he suffers from a mental illness. He is a loner from the state of Georgia. [¶] The defendant's two strikes did occur within apparently minutes of each other. One could actually be called a preparatory act to the second. The judge did give him consecutive sentences for those offenses which the Court had -- this Court has no objection with. [¶] But I think

the fact that his two strikes occurring within minutes of each other is something that this Court can consider at the time of striking one. [¶] Finally, as I indicated, the defendant does have a history of lashing out verbally and in writing, but he has apparently never taken a single step to carry out these threats. [¶] He received two years for threatening [a] judge. He threatened a sheriff. No charges were pursued. I'm quite sure he threatened some of our defense attorneys. No charges were pursued. He threatened a cellmate. No charges were pursued. And he has threatened staff two or three times, and for that he has simply lost good-time credits. [¶] I am well aware of the stature of the victim. She clearly had a very impassioned statement, has clearly affected her. [¶] The Court finds once again that six years at eighty percent is sufficient considering the defendant's mental disorder and his history of lashing out with apparently no ability or intent to carry out his threats."

Defendant then waived his rights, pled guilty to counts one and two, and admitted the prior conviction allegations, in exchange for a six-year term. Once again the People objected that the court's "plea bargain with the defendant" was "violative of the three strikes law" and "an abuse of [its] discretion." For the reasons it already had stated, the court struck one of defendant's prior serious felony convictions and imposed the upper term of three years on count one, doubled to six years because of his other prior serious felony conviction. The court specified that at least 80 percent of this term would be served "consecutive[ly] to the time [he is] presently serving" and that this sentence is "sufficient in the interest

of justice, especially in light of the defendant's mental illness." The court also imposed and stayed the sentence on count two pursuant to section 654.

The People appeal.

DISCUSSION

I

We begin by rejecting the People's claim that the trial court entered into an unauthorized "judicial plea bargain when it offered to dismiss one of defendant's strike priors, and impose a six-year sentence" if he admitted the charges.

Section 1192.7, subdivision (b) defines "'plea bargaining'" as "any bargaining, negotiation, or discussion between a criminal defendant, or his or her counsel, and a prosecuting attorney or judge, whereby the defendant agrees to plead guilty or nolo contendere, in exchange for any promises, commitments, concessions, assurances, or consideration by the prosecuting attorney or judge relating to any charge against the defendant or to the sentencing of the defendant."

Long ago, our state Supreme Court noted: "The process of plea bargaining which has received statutory and judicial authorization as an appropriate method of disposing of criminal prosecutions contemplates an agreement negotiated by the People and the defendant and approved by the court. [Citations.] Pursuant to this procedure the defendant agrees to plead guilty in order to obtain a reciprocal benefit, generally consisting of a less severe punishment than that which could result if he were convicted of all offenses charged. [Citation.] This more lenient disposition of the charges is secured

in part by prosecutorial consent to the imposition of such clement punishment [citation], by the People's acceptance of a plea to a lesser offense than that charged, either in degree [citation] or kind [citation], or by the prosecutor's dismissal of one or more counts of a multi-count indictment or information. Judicial approval is an essential condition precedent to the effectiveness of the 'bargain' worked out by the defense and prosecution. [Citations.] But implicit in all of this is a process of 'bargaining' between the adverse parties to the case--the People represented by the prosecutor on one side, the defendant represented by his counsel on the other--which bargaining results in an agreement between them. [Citation.]" (*People v. Orin* (1975) 13 Cal.3d 937, 942-943.)

Thus, "the court has no authority to substitute itself as the representative of the People in the negotiation process and under the guise of 'plea bargaining' to 'agree' to a disposition of the case over prosecutorial objection. Such judicial activity would contravene express statutory provisions requiring the prosecutor's consent to the proposed disposition, would detract from the judge's ability to remain detached and neutral in evaluating the voluntariness of the plea and the fairness of the bargain to society as well as to the defendant, and would present a substantial danger of unintentional coercion of defendants who may be intimidated by the judge's participation in the matter. [Citation.]" (*People v. Orin*, *supra*, 13 Cal.3d at p. 943, fn. omitted.)

Distinguished from the classic plea bargain is the circumstance in which the defendant admits every charge, including any special

allegations, and "all that remains is the pronouncement of judgment and sentencing." (*People v. Vessell* (1995) 36 Cal.App.4th 285, 296 (hereafter *Vessell*).) In that situation, "no prosecutorial consent is required." (*People v. Allan* (1996) 49 Cal.App.4th 1507, 1516 (hereafter *Allan*).) Rather, the trial court "may indicate to [the] defendant what its sentence will be on a given set of facts without interference from the prosecutor except for the prosecutor's inherent right to challenge the factual predicate and to argue that the court's intended sentence is wrong." (*People v. Superior Court (Felmann)* (1976) 59 Cal.App.3d 270, 276.) Such an "'indicated sentence' . . . falls within the 'boundaries of the court's inherent sentencing powers.' [Citation.]" (*Vessell*, *supra*, 36 Cal.App.4th at p. 296, quoting *People v. Superior Court* (*Ramos*) (1991) 235 Cal.App.3d 1261, 1271 (hereafter *Ramos*).)

According to the People, the trial court here "entered into an unauthorized plea agreement by offering to dismiss the defendant's priors [*sic*] in order to achieve a six-year sentence in exchange for [his] plea." Not so. The court simply stated that if defendant pled guilty to the two counts being prosecuted against him and admitted all the special allegations, the court would strike one of defendant's two prior serious felony convictions and sentence him to six years in prison. This is the type of "indicated sentence" approved in *Vessell, Allan,* and *Ramos*. Once defendant pled guilty to all the counts and admitted all the special allegations, he was in the same position as if a jury or the court had convicted him of the counts and found true the special allegations. In either case, the question whether to strike one of his prior serious felony

convictions was a sentencing issue subject to the discretion of the trial court. (*People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, 518, 527-531 (hereafter *Romero*).)

II

We turn now to the People's argument that the trial court abused its discretion by striking one of defendant's prior serious felony convictions for purposes of sentencing.

Section 1385, subdivision (a) states that a judge "may, either of his or her own motion or upon the application of the prosecuting attorney, and in furtherance of justice, order an action to be dismissed." The language "in furtherance of justice" requires the judge to consider both the constitutional rights of the defendant and the interests of society in exercising its discretion under section 1385 to strike a prior serious felony conviction. (*Romero*, *supra*, 13 Cal.4th at p. 530.) In doing so, the judge "must consider whether, in light of the nature and circumstances of [the defendant's] present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, the defendant may be deemed outside the scheme's spirit, in whole or in part, and hence should be treated as though he had not previously been convicted of one or more serious and/or violent felonies." (*People v. Williams* (1998) 17 Cal.4th 148, 161 (hereafter *Williams*).)

Here, the People claim that the trial court "did not consider the nature and circumstances of defendant's criminal record as well as his background, character, and prospects. [Citation.] Rather, the court mainly exercised its discretion on the improper consideration of finding six years 'sufficient' since the threat

was not likely to be carried out, despite the fear it inflicted on the victim." The record does not support this claim.

The statements of the trial court, quoted above, show that it carefully reviewed defendant's criminal and disciplinary history. It also considered defendant's mental disorder. In doing so, the court fulfilled its duty to assess defendant's background, character, and prospects. The court also fulfilled its duty to consider the nature and circumstances of defendant's current crimes, the threat to kill Deputy District Attorney Mary Hanlon Stone. The court concluded that the threat was not as serious as other such crimes because it was unsophisticated, in that defendant signed the threatening letter and gave it to a prison guard to mail, and defendant had no means to carry out the threat. The court also noted that the threat appeared to be a product of defendant's mental disorder, since it occurred while he was off his medication, and that he had never followed through on other threats he had made in the past.

Having considered "the nature and circumstances of the defendant's present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects" (*Williams, supra,* 17 Cal.4th at p. 161), the trial court exercised its discretion not to treat him as a three strikes offender because "six years at eighty percent [of that term, rather than 25 years to life] is sufficient considering the defendant's mental disorder and his history of lashing out with apparently no ability or intent to carry out his threats."

Our review of this exercise of discretion is "deferential." (*Williams, supra,* 17 Cal.4th at p. 162.) We cannot overturn the

trial court unless its ruling "'falls outside the bounds of reason' under the applicable law and the relevant facts [citations]." (*Ibid*.) In order to fall outside the bounds of reason, the ruling must be "palpably arbitrary, capricious and patently absurd." (*People v. Jennings* (2000) 81 Cal.App.4th 1301, 1314.)

Under the applicable law and relevant facts, the trial court reasonably could have concluded that defendant should not be deemed outside the "spirit" of the three strikes law, in whole or in part, and should not be "treated as though he had not previously been convicted of one or more serious and/or violent felonies" (*Williams*, *supra*, 17 Cal.4th at p. 161). On the other hand, we cannot say the trial court abused its discretion in concluding that, in light of the nature of the current offense and the role of defendant's mental disorder in its commission, defendant should be sentenced as a two-strikes offender. While reasonable minds could differ, the trial court's ruling was not "palpably arbitrary, capricious and patently absurd." (*People v. Jennings*, *supra*, 81 Cal.App.4th at p. 1314.)

DISPOSITION

The judgment is affirmed.

SCOTLAND, P.J.

We concur:

MORRISON, J.

BUTZ, J.